



BRB No. 16-0116

SCOTT McINTYRE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>Aug. 8, 2016</u>
)	
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Compensation Order Denial of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut for claimant.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Denial of Attorney Fees (OWCP No. 01-300903) of District Director David Groeneveld rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The district director's order will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On May 7, 2014, claimant injured his right knee while working for employer as a shipfitter. Employer voluntarily paid claimant temporary total disability benefits from May 8 to June 17, 2014. On January 6, 2015, claimant's counsel filed a Form LS-203, Claim for Compensation, and, on January 16, 2015, the district director sent notice to employer that the claim had been filed. Employer did not controvert the claim. On approximately June 12, 2015, employer received a medical report from Dr. Willets

wherein he diagnosed claimant with a two percent impairment to his right lower extremity. On June 17, 2015, employer filed a Notice of Payment of Compensation

Without Award, and it commenced paying claimant permanent partial disability benefits on the same date, based on Dr. Willets's impairment rating.

Subsequently, claimant's counsel filed a fee petition for work performed before the district director in the amount of \$3,785.49, representing 12 hours of attorney time at an hourly rate of \$310, .5 hour of paralegal time at an hourly rate of \$85, and \$22.99 in expenses. Employer objected to its liability for an attorney's fee, averring it is not liable for counsel's fee because it did not controvert the claim and paid benefits promptly upon receiving Dr. Willets's report. Finding that employer voluntarily paid benefits, the district director concluded that counsel did not obtain additional benefits for claimant beyond those voluntarily paid and, therefore, he found that employer is not liable for an attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a).

On appeal, claimant challenges the district director's denial of an employer-paid attorney's fee. Employer did not file a response brief. Claimant contends the district director erred in denying his counsel an attorney's fee because employer declined to pay any compensation within 30 days of receiving notice of the claim from the district director. We agree.

Section 28(a) of the Act states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a). Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim from the district director. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). An employer's inaction during the 30-day period has been held to represent a "decline to pay" benefits and its voluntary payment of benefits before the claim has been filed or after the 30-day period expires does not prevent application of Section 28(a). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *see also Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

In *Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale*

Industries, Inc. v. Alario, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), the Board rejected the employer's argument that it could not have paid benefits within the 30-day time frame because it did not know what amount to pay. The Board agreed with the Director, Office of Workers' Compensation Programs, that nothing in the Act requires a claimant to submit evidence of disability or impairment with his claim for compensation, *see* 33 U.S.C. §913, and that receipt of the notice of the claim itself is what triggers the commencement of the 30-day period under Section 28(a). The Board stated that the 30-day period allows an employer sufficient time to have a claimant examined and to determine whether to pay benefits or to controvert the claim. *Craig*, 36 BRBS at 66-67; *Craig*, 35 BRBS at 169-170. The United States Court of Appeals for the Fifth Circuit affirmed the Board's decisions in *Craig*, holding that a claimant need not supply evidence of the extent of his claimed disability with his claim for compensation. *Alario*, 355 F.3d at 852-853, 37 BRBS at 118-119(CRT).

In this case, employer's voluntary payment of benefits before the claim was filed is immaterial to the applicability of Section 28(a). *See Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). Moreover, the fact that employer promptly and voluntarily paid benefits upon receiving Dr. Willetts's report in June 2015 does not negate that it "declined to pay any compensation" before the expiration of the 30-day period following its receipt of the notice of the claim in January 2015, irrespective of whether claimant provided evidence of impairment with his claim. *Alario*, 355 F.3d at 852-853, 37 BRBS at 118-119(CRT). Therefore, we agree with claimant that employer's inaction during the 30-day period after it received notice of the claim equates to its having "declined to pay any compensation." *Mangiantine*, 42 BRBS 30. Further, claimant utilized counsel's services to successfully obtain permanent partial disability benefits. *Id.* Therefore, we vacate the district director's denial of an employer-paid attorney's fee and we remand the case for the district director to determine the amount of the fee for which employer is liable pursuant to Section 28(a).

Accordingly, the district director's Compensation Order Denial of Attorney Fees is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge